IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVN. APPLICATION NO. 73 OF 2006

Mrs. Jaywanti Prakash Shikhare. ... Applicant.

V/s.

The State of Maharashtra & Anr. ... Respondents.

Mr. Kafil Khan for the Applicant.

Mr. Rajesh More, APP for the State.

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CORAM : S.C. DHARMADHIKARI,J.

14TH DECEMBER 2006.

P.C. :

1. The grievance of the original complainant - petitioner before me is that the Lower Appellate Court has allowed the Appeal of the accused Respondent Nos.1 and 2 before him without adverting to the merits of the case set up in the complaint instituted under Section 138 of the Negotiable Instruments Act by the Petitioner herein.

2. It is his submission that after a full fledged trial, the Metropolitan Magistrate, 14th Court, Girgaon, Mumbai, by his Judgment and Order dated 15th April 2004 convicted the Respondent No.2 before him for the offence punishable under Section 138 of the Negotiable Instruments Act and sentenced him to suffer simple imprisonment for three months and to pay compensation of Rs.9.00 lacs to the Petitioner within two months from the date of the

order. Aggrieved by this conviction and sentence, Respondent No.2 preferred Criminal Appeal No.2123 of 2004 and by the Judgment and Order dated 1st February 2006, the said Appeal has been allowed.

3. This Revision Application was placed before this Court on 14th February 2006 and this Court called for the Record and Proceedings so also directed that notice be issued to the Respondents. It was specifically stated that the matter would be disposed of finally. The Respondent No.1 have been duly served. There is a affidavit of service also filed by the Petitioner's Advocate. None appears for the Respondent when the matter is called out.

4. In the above circumstances, there shall be Rule. Returnable forthwith.

5. The Criminal Appeal has been disposed of by the learned Additional Sessions Judge, Bombay only on the ground that the second Respondent did not have an opportunity to step into the box so also his statement under Section 313 was not recorded in accordance with law. The entire prosecution case has been put to him in one sentence and his response elicited. Such approach according to the Lower Appellate Court was not in accordance with law. On this short ground alone, the Criminal Appeal is allowed. The conviction and sentence

was set aside and the matter was remitted back to the Trial Court for decision afresh.

6. My attention is invited by the learned Advocate for the Petitioner to the fact that the Trial Court granted full opportunity to the accused. He has examined as many as three witnesses. He was given opportunity to step into the witness box but he gave written purshis that he does not wish to step into the box and that his evidence be declared as closed. This fact is specifically mentioned in para 7 of trial Court's order. However, in the memo of Appeal no grounds are raised with regard to the manner in which the statement under Section 313 of the Code of Criminal Procedure was recorded by the Metropolitan Magistrate.

7. From a perusal of the Judgment of the Courts below, I am satisfied that there is substance in the grievance of the Petitioner. The manner in which the Appeal has been allowed and disposed of is fair from satisfactory. When the entire record is before the Lower Appellate Court, it was its plain duty who to scrutinize it and thereafter, deal with the Appeal on merits and in accordance with law. Disposal of the Appeal only on the ground that the accused did not have a proper opportunity to defend himself is not proper in the facts and circumstances of this case. However, since I am restoring the Criminal Appeal to file, I do not want to express any opinion on the merits of the

charges so also the order of conviction and sentence. In the interest of justice, the Petitioner's Advocate submits that the Criminal Appeal be restored to file for being disposed of afresh on merits and in accordance with law. This approach is fair and just, therefore, commends to me.

The statement is accepted.

7. Considering the fact that the accused is 82 years of age, it would be appropriate to direct that the Criminal Appeal shall be disposed of within a period of two months from the receipt of the copy of this order. The Revision Application is allowed. Rule is made absolute in terms of prayer clause (a).

8. Criminal Appeal No.212 of 2004 stands restored to the file of the Appellate Court for being dealt with afresh on merits and in accordance with law after giving opportunity to both sides. All contentions on merits are kept open and it is clarified that no opinion is expressed on the same. The learned Judge to whom the Appeal is assigned shall endeavour to dispose of the Appeal within a period of two months from the receipt of the copy of this order.

(S.C.Dharmadhikari,J.)